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No. 973

IN THE

SUPREME COURT OF THE UNITED STATES

FOOD FAIR STORES, INC., a Foreign Corporation Authorized to Do Business in Florida, and POMPANO FAIR REALTY CO., a Florida Corporation,
Appellants,

vs.

THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA.

JURISDICTIONAL STATEMENT

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R—Record
V—Volume

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. .....

FOOD FAIR STORES, INC., a Foreign Corporation Authorized to Do Business in Florida, and POMPANO FAIR REALTY CO., a Florida Corporation,

Appellants,

vs.

THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,

Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA.

JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Florida entered on the 5th day of November, 1962, denying the petition of the Appellants for a Writ of Certiorari to review the judgment of the District Court of Appeal of Florida, Second District, affirming the judgment of the Circuit Court of the 15th Judicial Circuit in and for Broward County, Florida; and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINIONS BELOW

The denial of Appellants' petition for a Writ of Certiorari to the Supreme Court of Florida is not reported. The opinion of the District Court of Appeal of Florida, Second District, is reported in 143 So.2d 58 (Fla. App. 1962). The opinion of the Circuit Court of the 15th Judicial Circuit in and for Broward County, Florida, is not reported. Copies of the judgments below are attached hereto as Appendix A.

JURISDICTION

The Zoning Board of Appeals of Pompano Beach, Florida, denied Appellants' petition for a building permit under the zoning code of that city. The Circuit Court of the 15th Judicial Circuit in and for Broward County, Florida, entered a judgment on the 12th day of October, 1960, quashing its Writ of Certiorari to review the Zoning Board of Appeals' denial of the permit. The District Court of Appeal of Florida, Second District, entered a judgment affirming the Circuit Court judgment on the 27th day of June, 1962. The Supreme Court of Florida entered a judgment denying Appellants' petition for a Writ of Certiorari on the 5th day of November, 1962, and notice of appeal was filed in that court on the 1st day of February, 1963. The jurisdiction of the Supreme Court of the United States to review this decision by direct appeal is conferred by Title 28, United States Code, Section 1257 (2). The following decisions sustain the jurisdiction of the United States Supreme Court to review the judgment on direct appeal in this case: *Zucht* v. *King*, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194; *Atlantic Coast Line R. Co.* v. *City of Goldsboro*, 232 U.S. 548, 34 S.Ct. 364, 58 L.Ed. 721; *Rein-*

man v. *City of Little Rock*, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900; *King Mfg. Co.* v. *Augusta*, 277 U.S. 100, 48 S.Ct. 489, 72 L.Ed. 801; *Staub* v. *City of Baxley*, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed. 2d 302; *Jamison* v. *Texas*, 318 U.S. 413, 63 S.Ct. 669, 87 L.Ed. 869; *Ward* v. *Board of County Com'rs*, 235 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751.

STATUTES INVOLVED

ORDINANCE NUMBER 664, CHAPTER 50, Sections 50.189 (1) (1) (1)-(5) and 50.26, Zoning Code, Code of Ordinances. City of Pompano Beach, Florida, 1958; and Section 1 of the 14th Amendment of the Constitution of the United States of America are set forth in Appendix B hereto.

QUESTIONS PRESENTED

1. Whether ordinances of the City of Pompano Beach, Florida, which prohibit the Appellants from erecting a gasoline filling station within seven hundred fifty feet of another gasoline filling station along the same street, while allowing others similarly situated to do so, and which at the same time permit gasoline filling stations only one hundred fifty feet from public assemblies, theatres, auditoriums and other places of public congregation are an improper exercise of state police power, which exercise denies Appellants equal protection of the law guaranteed by the 14th Amendment of the Constitution of the United States of America.

2. Whether ordinances of the City of Pompano Beach, Florida, which prohibit the Appellants from erecting a gasoline filling station within seven hundred fifty feet of another gasoline filling station, while allowing others

similarly situated to do so, and which at the same time allow gasoline filling stations to be erected back to back and side to side within seven hundred fifty feet of each other, provided they are not along the same street, are an improper exercise of state police power, which exercise denies Appellants equal protection of the law guaranteed by the 14th Amendment of the Constitution of the United States of America.

STATEMENT

The Appellant, Pompano Fair Realty Co., a Florida corporation, is the lessee under a 99 year lease of certain land located in Pompano Beach, Florida, described as follows:

> All that part of the SE ¼ of the NE ¼ of the SE ¼, less the North 275 feet thereof, except the West 130 feet of Section 36, Township 48 South, Range 42 East, lying West of the West Right-of-Way of Federal Highway (U.S. #1), Pompano Beach, Broward County, Florida, also known as 401 North Federal Highway.

Appellant, Food Fair Stores, Inc., a foreign corporation, authorized to do business in the State of Florida, is a sub-lessee of the above-described property. Appellee, the Zoning Board of Appeals, is an agency of the municipal corporation existing under the laws of the State of Florida, known as the City of Pompano Beach, Florida.

On March 29, 1960, the Chief Building Inspector of the City of Pompano Beach, Florida, refused Appellant, Food Fair Stores, Inc., a building permit to erect a gasoline filling station on the above-described property (R-V I-3), such denial being under the authority of Ordinance No. 664, section 50.189 (1) (l) (1) of the City of Pompano Beach, Florida, which provides, in part:

> "No filling station for automotive type service shall hereafter be constructed within 750 feet on a direct line measured along a street from the nearest corner of any lot, piece or parcel of land, abutting the same street, used for such purposes. . . ."

and upon the ground that there already existed a gasoline filling station within 750 feet of the proposed site of the station of Appellant, Food Fair Stores, Inc.

On July 14, 1960, Food Fair Stores, Inc., filed an appeal of the decision of the Chief Building Inspector with the Zoning Board of Appeals of the City of Pompano Beach, Florida (R-V I-7), the next and highest administrative authority having jurisdiction thereof, which appeal was orally amended to include Pompano Fair Realty Co. as co-appellant.

On August 26, 1960, the Zoning Board of Appeals denied the request of the Appellant to issue the building permit (R-V I-10), the Board also acting under authority of Ordinance No. 664, section 50.189 (1) (1) (1). The Appellants herein then filed a petition for a Writ of Certiorari, under Florida Statute 176.16, *et seq.*, in and to the Circuit Court of the 15th Judicial Circuit in and for Broward County, Florida, alleging in said Petition, among other things:

> "That Ordinance 664 § 50.189 (1) is repugnant to the 14th Amendment of the Constitution of the United States because it deprives Petitioners of their property without due process of the law and fails to accord them the equal protection of the law." (R-V I-3)

The Circuit Court of Broward County, Florida, issued its Writ of Certiorari on October 12, 1960 (R-V I-20) and a Final Hearing was had thereon on July 19, 1961 (R-V I-[illegible]). On August 23, 1961, the Circuit Court entered a Final Judgment [See Appendix A] (R-V I-54) quashing the

Writ. In the opinion accompanying the judgment the Court stated, *inter alia*:

> "Petitioners here attack the ordinance upon the sole ground that the ordinance is unconstitutional." (R-V I-55)
>
> "It is, therefore, the opinion of this Court that the ordinance in question is constitutional and that it represents a proper exercise of the zoning and police power of the City of Pompano Beach, Florida." (R-V I-56)

Thereupon, the Appellants herein filed a timely appeal of the judgment of the Circuit Court of Broward County to the District Court of Appeal of Florida, Second District (R-V I-57), and listed, *inter alia*, in their Assignments of Error that:

> "The Court erred in its Final Judgment in finding that the Zoning Code, and ordinances in question, as it pertains to the Appellants here, was a constitutional and proper exercise of the zoning and police power of the City of Pompano Beach, Florida." (R-V I-58)

In an opinion filed June 27, 1962 [See Appendix A] (R-V I-64), the District Court of Appeal affirmed the Circuit Court, citing with approval the lower court's recognition that "Petitioners here attack the ordinance on the sole ground that the ordinance is unconstitutional", and stating, *inter alia*:

> "We find nothing unreasonable in the ordinance hereinabove discussed, and therefore, affirm the lower court." (R-V I-70)

Thereafter Appellants herein filed in the Supreme Court of Florida a Petition for a Writ of Certiorari from the District Court of Appeal, Second District, State of

Florida, reciting in said petition that the District Court of Appeal was presented with, *inter alia,* the following point of law:

> "Whether the Court below erred in determining that an ordinance of the City of Pompano Beach prohibiting the Appellant from erecting a gasoline filling station within seven hundred fifty feet of another station along the same street, while allowing others to do so and while permitting gasoline filling stations only one hundred fifty feet along the same street from public assemblies, theatres, auditoriums and other places where people congregated, gave equal protection of the law as provided by Sections 1 and 12 of the Declaration of Rights of the Florida Constitution and the Fourteenth Amendment to the Constitution of the United States of America."

and that "on these points of law the District Court of Appeal, Second District, found nothing unreasonable in the ordinance."

The Supreme Court of Florida, without opinion on the merits, on November 5, 1962, ordered that Appellants' Petition for Writ of Certiorari be denied.

Appellants then filed notice of Appeal to the Supreme Court of the United States on February 1, 1963.

THE QUESTIONS ARE SUBSTANTIAL

The exercise of state legislative power to deprive an individual, natural or corporate, of the fair use and enjoyment of his or its property under circumstances wherein the individual is not treated in the same manner as others similarly situated, and wherein regulation is imposed which is not reasonably related to the purpose of correcting the evil sought to be corrected is an exercise of power which cannot be tolerated under the 14th Amendment.

It is well settled that corporations are "persons" within the meaning of the 14th Amendment, *Santa Clara County* v. *Southern Pac. R. Co.*, 118 U.S. 394, 6 S.Ct. 1132, 30 L. Ed. 118; *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis*, 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666; *Smith* v. *Ames*, 169 U.S. 466, 18 S.Ct. 418, 42 L.Ed. 819; that a muncipal ordinance is a state statute constituting state action within the meaning of the 14th Amendment, *Reinman* v. *City of Little Rock*, 237 U.S. 171, 35 S.Ct. 511, 59 L.Ed. 900; *King Mfg. Co.* v. *Augusta*, 277 U.S. 100, 48 S.Ct. 489, 72 L.Ed. 801; *Atlantic Coast Line R. Co.* v. *City of Goldsboro*, 232 U.S. 548, 34 S.Ct. 364, 58 L.Ed. 721; *Zucht* v. *King*, 260 U.S. 174, 43 S.Ct. 24, 67 L.Ed. 194; and that zoning regulations are a valid and legitimate exercise of the state police power to legislate for the protection of the health, safety and general welfare of the people within its borders, *Euclid* v. *Ambler Realty Co.*, 272 U.S. 365, 47 S.Ct. 114, 71 L.Ed. 303. However, the power of the state and its instrumentalities to regulate is not without limit just because the power is exercised within a legitimate sphere. Such power is subject to limitations wherein certain fundamental individual rights will not be suffered to be surrendered.

It is clear that the State in implementing its police powers may establish classifications of individuals and groups for the purpose of legislating to control conduct inimical to the common good. Legislative regulation may also extend to absolute prohibition. *Breard* v. *Alexandria*, 341 U.S. 622, 71 S.Ct. 920, 95 L.Ed. 1233. But there is the limitation that classification and prohibition must be reasonable in the sense that all those who are similarly situated must be treated alike. *Southern R. Co.* v. *Greene*, 216 U.S. 400, 30 S.Ct. 287, 54 L.Ed. 536; *Barbier* v. *Connolly*, 113 U.S. 27, 5 S.Ct. 357, 28 L.Ed. 923; *Soon Hing* v. *Crowley*, 113 U.S. 703, 5 S.Ct. 730, 28 L.Ed. 1145. Both

classification and prohibition must bear a reasonable relation to the evil sought to be corrected. *Gulf, Colorado & Santa Fe R. Co.* v. *Ellis,* 165 U.S. 150, 17 S.Ct. 255, 41 L.Ed. 666; *Magoun* v. *Illinois Trust & Savings Bank,* 170 U.S. 283, 18 S.Ct. 594, 42 L.Ed. 1037; *Atchison, Topeka & Santa Fe R. Co.* v. *Matthews,* 174 U.S. 96, 19 S.Ct. 609, 43 L.Ed. 909.

The questions in this cause are substantial because they involve (1) state legislation in the form of an ordinance which contains an unreasonable classification wherein there is arbitrary discrimination against the Appellants and in favor of others similarly situated; (2) regulation which does not bear a reasonable relation to the evil sought to be corrected, especially in view of the unreasonable classification, and (3) judicial sanction of the consequent denial of equal protection of the law by refusal to adequately rule on this federal question presented below.

Let us consider first the question of the reasonableness of the classification established under City of Pompano Beach Ordinance No. 50.189 which provides:

> Within any business "3" retail business district, as indicated on the zone plan, no building or premises shall be erected, used, arranged, or designed to be used in whole or in part for any industrial or manufacturing purposes, or for any other than one or more of the following specified uses:
>
> (1) PRINCIPAL USES
>
> (1) Filling stations for automotive vehicular service subject to the following provisions:
>
> 1. No filling station for automotive type service shall hereafter be constructed within seven hundred and fifty feet on a direct line measured along a street

from the nearest corner of any lot, piece or parcel of land, abutting the same street, used for such purposes. Distance limitations do not apply to stations not along the same street having both entrance and exit along a different street. Pumps or pump islands shall not be located closer than fifteen feet from any street line. . . .

4. Provided further that this section shall not apply to property or properties leased or owned in fee simple as evidenced by deed or lease of record prior to August 13, A.D., 1957, by any bonded gasoline distributor or his agent, dealer, leasee or consignee.

The ordinance provisions with which we are concerned [Sections (1) (1) (1) and (1) (1) (4)] establish two different groups. One group *is not* allowed to devote its property to the use of a gasoline filling station within a prescribed area. Another group, "bonded gasoline distributors" their "agents, dealers, leasees or consignees" [which said group is not further defined anywhere in Ordinance No. 664, Chapter 50], *is* allowed the privilege of devoting its property to such use. The Appellants, in any event, are not "bonded gasoline distributors", nor "agents, dealers, leasees or consignees" thereof. Section (1) (1) (1) sets out the prohibited use in terms which apply to all equally. Section (1) (1) (4) creates an exception in favor of "bonded gasoline distributors" their "agents, dealers, leasees or consignees" who owned or leased property within the prescribed area prior to August 13, 1957. The ordinance on its face denies Appellants equal protection of the law unless there is some reasonable basis for allowing a distinction between bonded gasoline distributors, who were owners or lessees of property

as of August 13, 1957, and everyone else who may desire to erect a filling station. Legislative discriminations which are open to objection are those wherein persons engaged in the same business are subjected to different restrictions or are held entitled to different privileges under the same conditions. It is then that the discrimination can be said to impair the equal rights which all can claim under the law. *Soon Hing* v. *Crowley*, 113 U.S. 703, 5 S.Ct. 730, 28 L.Ed. 1145. There is no apparent reason for the exception in favor of "bonded gasoline distributors" because in the economic sense they have no greater right to engage in the business of operating gasoline filling stations and enjoy the use of their property for that purpose within the area in which the use is prohibited than any other group. Nor for that matter is there any basis of differentiation between bonded gasoline distributors who owned or leased property within the area prior to August 13, 1957, and bonded gasoline distributors who became owners or lessees after that date and were not agents, dealers, lessees or consignees of the former. The granting of a special privilege to one portion of a group similarly situated is the same as a denial of a right to all others in the group.

The classification made by the City under this ordinance is clearly arbitrary and unreasonable. It has the effect of denying Appellants the right to enjoy the use of their property while allowing others to do so. It limits competition against existing gasoline filling stations to "bonded gasoline distributors", their "agents, dealers, leasees or consignees" who owned or leased property prior to August 13, 1957. And it has the economic effect of creating a monopoly in favor of existing stations and those allowed to be constructed by the excepted group.

Next let us consider the question whether under section 50.189 of the ordinance the prohibited use and the

exception in favor of bonded gasoline distributors are reasonably related to the evil sought to be corrected.

In the case of gasoline filling stations the health and safety interests of the public are threatened by the hazards of fire, explosion, noxious odors, fumes, and so forth. Within a geometric frame of reference these hazards are such that they would have a radial effect on surrounding property and persons. These hazards pose a threat to all surrounding persons and property in many directions or all directions at once, not just up and down a given street on a "direct line." Thus, limiting gasoline stations to a minimum distance between them of 750 feet along the same street does not inhibit the effect of these hazards.

Assume however, that such a straight-line distance limitation is reasonably related to minimizing these or some other hazards. Where a police measure amounts to a prohibition, the policy of prohibition implies an evil or danger of exceptional magnitude, and any exception not merely allows a partial perpetuation of the evil or danger, but in addition may give to those excepted a monopoly instead of a mere advantage. Freund, *Police Power*, §686. Where a restraint is confined to a particular group or class, that class must present the danger dealt with in a more marked and uniform degree than the classes omitted; and where the restraint is general, with certain exceptions, the excepted classes must either be entirely free from the danger, or the exception must tend to reduce the general danger, or a distinct and legitimate public policy must favor the toleration of the evil where it is outweighed by great benefits. Freund, *Police Power*, §738.

The structure proposed to be erected by the Appellants meets all other requirements of the Appellee as to safety. Under the facts of this case if the prohibition is reasonably related to minimizing the dangers incident to

the existence of a gasoline filling station then the policy of prohibiting stations within the prescribed distance must be one of prohibiting all; the excepted class under this ordinance is neither free from the danger nor does the fact of operation of gasoline filling stations by that class tend to reduce the danger because the hazards inhere in the nature of the business.

The courts below in upholding the ordinance have chosen to deal only with the surface issue as to whether or not exercise of the police power in general to regulate filling stations is legitimate. The more narrow issue of denial of equal protection of the law as herein set out has not been adequately considered. The Circuit Court in finding the ordinance "constitutional", the District Court of Appeal in finding "nothing unreasonable" in the ordinance, and the Supreme Court of Florida in declining to consider the question of denial of equal protection of the law under the 14th Amendment have all either skirted or erroneously decided the question. Yet the state courts have necessarily decided the federal question involved here because the effect of upholding the ordinance is to deny the Appellants equal protection of the law guaranteed under the 14th Amendment.

This Court has held that constitutional rights are denied as well by the refusal of state courts to decide a federal question as by an erroneous decision of it, *Lawrence v. State Tax Comm.*, 286 U.S. 276, 52 S.Ct. 556, 76 L.Ed. 1102; that a state court may not avoid deciding federal questions and thus defeat jurisdiction of the United States Supreme Court by putting forward non-federal grounds of decision which are without any fair or substantial support; that whether constitutional rights were given due recognition is a question as to which this Court's judgment may be invoked; and that it is within the province of

this Court to inquire not only whether the right was denied in express terms, but also whether it was denied in substance and effect. *Staub* v. *City of Baxley;* 355 U.S. 313, 78 S.Ct. 279, 2 L.Ed. 2d 302; *Ward* v. *Board of County Com'rs,* 235 U.S. 17, 40 S.Ct. 419, 64 L.Ed. 751.

The Appellants therefore respectfully urge this Court to accept jurisdiction to determine the questions presented.

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APPENDIX A

Text of Opinions and Judgments Below

IN THE CIRCUIT COURT OF THE FIFTEENTH JUDICIAL CIRCUIT OF THE STATE OF FLORIDA, IN AND FOR BROWARD COUNTY. AT LAW.

FOOD FAIR STORES, INC., etc., et al., Petitioners, vs. THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA, Respondent.	No. L60-519C

Final Judgment

This cause was duly presented by certiorari from the Zoning Board of Appeals of the City of Pompano Beach, Florida. Extensive testimony was taken before this Court under authority of the cases of State v. Furen, Fla., 118 So.2d 6; Josephson v. Autrey, Fla., 96 So.2d 784; and Union Trust Company v. Lucas, Fla., 125 So.2d 582. This testimony, all pleadings and exhibits, and the advice of counsel have been considered.

Petitioners wish to erect a gasoline service station upon certain property leased by them in Pompano Beach, Florida. Their wishes were frustrated by Ordinance No. 664, § 50.189(1) of the City of Pompano Beach which provides, inter alia, that no filling station for automotive type service shall hereafter be constructed within 750 feet on a direct line measured along a street from the nearest corner

of any lot, piece or parcel of land, abutting the same street, used for such purposes. The proposed station would be located at a street intersection, two corners of which are already occupied by gasoline service stations, and thus the proposal is exactly prohibited by the ordinance.

The Chief Building Inspector denied Petitioner's request for permissing [sic] to build whereupon Petitioners appealed to the Zoning Board of Appeals for a variance based on hardship. This appeal was properly denied.

Petitioners here attack the ordinance upon the sole ground that the ordinance is unconstitutional.

The criteria to be used by the Court in construing the validity of an ordinance is found in the case of Miami v. Kayfetz, Fla., 98 So.2d 798, where the Supreme Court promulgated these rules:

> "(1) In construing the validity of the ordinance in question we must: (1) assume that a valid ordinance was intended. State ex rel. Ellis v. Tampa Water Works Co., 1908, 56 Fla. 858, 47 So. 358, 19 L.R.A., N.S., 183; (2) construe the ordinance to be legal, if possible to do so, and strive to so construe it as to give reasonable effect to its provisions, State ex rel. Rand v. Brogden, 1922, 84 Fla. 520, 94 So. 653, Bentley-Gray Dry Goods Co. v. City of Tampa, 1939, 137 Fla. 641, 188 So. 758.
>
> (2) Further, the courts should be very cautious in declaring a municipal ordinance unreasonable, there being a peculiar propriety in permitting the inhabitants of a City through its proper officials to determine what rules are necessary for their own local government. State ex rel. Harkow v. McCarthy, 1936, 126 Fla. 433, 171 So. 314, City of Tacoma v. Keisel, 1912, 68 Wash. 685, 124 P. 137, 40 L.R.A., N.S., 757.
>
> (3-5) Where an ordinance is within the power of the municipality to enact it is presumed to be reason-

able, unless its unreasonable character appears on its face. State ex rel. Harkow v. McCarthy, supra; State ex rel. McAuley v. York, 1925, 90 Fla. 625, 106 So. 418. And when the authority to enact the ordinance does fairly appear, wide latitude is allowed in its exercise, where it does not appear that there has been, in action taken, an abuse of authority or a violation of organic or fundamental rights. State ex rel. Simpson v. Ackerly, 1915, 69 Fla. 23, 67 So. 232. If reasonable argument exists on the question of whether an ordinance is arbitrary or unreasonable, the legislative will must prevail. State ex rel. Skillman v. City of Miami, 1931, 101 Fla. 585, 134 So. 541."

As early as 1929, the Supreme Court of Florida in the case of Harz v. Paxton, Fla., 120 So. 3, recognized that the operation of gasoline filling stations involved acts which are potential menaces to public safety and health. The hazard has increased account of the greater number and speed of automobiles coupled with the problems of traffic, pedestrian and vehicular, in entering and leaving such stations. Accordingly, this Court's opinion is that gasoline service stations constitute an appropriate subject for municipal regulation.

Is the regulation in question reasonable and does it bear correct relation to the health, safety and general welfare of the citizens of Pompano Beach? This Court finds it to be proper using the mentioned criteria and under the authority of the case of State v. Peace, Fla., 190 So. 607. See also, 35 Fla. Jur., Zoning Laws, § 15.

The thrust of Petitioner's brief suggesting that the purpose of the ordinance was to limit competition finds no real basis in the record.

It is, therefore, the opinion of this Court that the ordinance in question is constitutional and that it represents a

proper exercise of the zoning and police power of the City of Pompano Beach, Florida.

Accordingly, it is

ORDERED and ADJUDGED that the Writ of Certiorari heretofore issued by this Court be and the same is hereby quashed, and the above entitled cause is hereby dismissed at Petitioner's costs.

Copy furnished counsel.

DONE and ORDERED this 23rd day of August, 1961.

/s/ JAMES H. WALDEN,
CIRCUIT JUDGE.

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
SECOND DISTRICT

JANUARY TERM, A. D. 1962

FOOD FAIR STORES, INC., etc., et al.,
Appellants,

vs.

ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,
Appellee.

Case No. 2871

Opinion filed June 27, 1962.

Appeal from the Circuit Court of Broward County; James H. Walden, Judge.

Alfred Aronovitz of Aronovitz, Aronovitz & Haverfield, Miami, for Appellants.

Bruno Di Giulian, Pompano Beach, for Appellee.

ALLEN, ACTING CHIEF JUDGE.

Appellants, petitioners below, are appealing from a final judgment quashing their petition for writ of certiorari to review a decision of appellee-respondent, Zoning Board of Appeals.

Section 50.189 (I) (1) of Ordinance 664 of the City of Pompano Beach provides inter alia:

"I. PRINCIPAL USES.

"(1) Filling stations for automotive vehicular service subject to the following provisions:

"(1) No filling station for automotive type service shall hereafter be constructed within seven hun-

dred and fifty feet on a direct line measured along a street from the nearest corner of any lot, piece or parcel of land, abutting the same street, used for such purposes. . . ."

Pursuant to the provision in the Ordinance set forth above, the Chief Building Inspector of Pompano Beach refused appellants a building permit to erect a gasoline filling station. Appellants appealed to the Zoning Board of Appeals seeking a variance based on hardship which was denied.

Certiorari, attacking the constitutionality of the Ordinance, was taken to the Circuit Court and the decision of the zoning board was upheld. The Circuit Judge, in his well-reasoned opinion quashing the writ, said:

"This cause was duly presented by certiorari from the Zoning Board of Appeals of the City of Pompano Beach, Florida. Extensive testimony was taken before this Court under authority of the cases of State v. Furen, Fla., 118 So.2d 6; Josephson v. Autrey, Fla., 96 So.2d 784; and Union Trust Company v. Lucas, Fla., 125 So.2d 582. This testimony, all pleadings and exhibits, and the advice of counsel have been considered.

"Petitioners wish to erect a gasoline service station upon certain property leased by them in Pompano Beach, Florida. Their wishes were frustrated by Ordinance No. 664, §50.189(1) of the City of Pompano Beach which provides, inter alia, that no filling station for automotive type service shall hereafter be constructed within 750 feet on a direct line measured along a street from the nearest corner of any lot, piece or parcel of land, abutting the same street, used for such purposes. The proposed station would be located at a street intersection, two corners of which are already occupied by gasoline service stations, and thus the proposal is exactly prohibited by the ordinance.

"The Chief Building Inspector denied Petitioner's request for permission to build whereupon Petitioners appealed to the Zoning Board of Appeals for a variance based on hardship. This appeal was properly denied.

"Petitioners here attack the ordinance upon the sole ground that the ordinance is unconstitutional.

"The criteria to be used by the Court in construing the validity of an ordinance is found in the case of Miami v. Kayfetz, Fla., 92 So.2d 798, where the Supreme Court promulgated these rules:

"'(1) In construing the validity of the ordinance in question we must: (1) assume that a valid ordinance was intended. State ex rel. Ellis v. Tampa Water Works Co., 1908, 56 Fla. 858, 47 So. 358, 19 L.R.A., N.S., 183; (2) construe the ordinance to be legal, if possible to do so, and strive to so construe it as to give reasonable effect to its provisions, State ex rel. Rand v. Brogden, 1922, 84 Fla. 520, 94 So. 653, Bentley-Gray Dry Goods Co. v. City of Tampa, 1939, 137 Fla. 641, 188 So. [illegible]3.

"'(2) Further, the courts should be very cautious in declaring a municipal ordinance unreasonable, there being a peculiar propriety in permitting the inhabitants of a city through its proper officials to determine what rules are necessary for their own local government. State ex rel. Harkow v. McCarthy, 1936, 126 Fla. 433, 171 So. 314, City of Tacoma v. Keisel, 1912, 68 Wash. 685, 124 P. 137, 40 L.R.A., N.S., 757.

"'(3-5) Where an ordinance is within the power of the municipality to enact it is presumed to be reasonable, unless its unreasonable character appears on its face. State ex rel. Harkow v. McCarthy, supra; State ex rel. McAuley v. York, 1925, 90 Fla. 625, 106 So. 418. And when the authority to enact the ordinance does fairly appear, wide latitude is allowed in its exercise, where it does not appear that there has been, in action taken, an abuse of

authority or a violation of organic or fundamental rights. State ex rel. Simpson v. Ackerly, 1915, 69 Fla. 23, 67 So. 232. If reasonable argument exists on the question of whether an ordinance is arbitrary or unreasonable, the legislative will must prevail. State ex rel. Skillman v. City of Miami, 1931, 101 Fla. 585, 134 So. 541.'

* * *

"Is the regulation in question reasonable and does it bear correct relation to the health, safety and general welfare of the citizens of Pompano Beach? This Court finds it to be proper using the mentioned criteria and under the authority of the case of State v. Peace, Fla., 190 So. 607. See also, 35 Fla. Jur., Zoning Laws, §15.

"The thrust of Petitioner's brief suggesting that the purpose of the ordinance was to limit competition finds no real basis in the record.

"It is, therefore, the opinion of this Court that the ordinance in question is constitutional and that it represents a proper exercise of the zoning and police power of the City of Pompano Beach, Florida."

Extensive testimony was taken in this case which included testimony of a professional traffic engineer, whose summarized testimony was to the effect that it is desirable to separate pedestrian and vehicular traffic; that marginal access points upon streets create greater traffic problems; that there is a traffic problem at the intersection where the gasoline station proposed by appellants was to be located and that the investment of the public in relation to U. S. Highway No. 1, an arterial highway, would thereby be destroyed; and that the indiscriminate construction of drive-in type businesses along arterial streets and on corners has a detrimental effect on vehicular and pedestrial [sic] traffic. Also testifying was the Director of Planning for Broward County, who stated that the planners gave special

consideration to gasoline stations because of problems peculiar to such businesses, including fire hazards, traffic hazards, pedestrian hazards and related problems; the necessity for complete prohibition of gasoline stations in certain areas; and the concern for certain esthetic considerations. There was also testimony concerning the location of public schools in close proximity to the intersection in question. The appellants strenuously argued that this zoning along distinct lines was done to create a monopoly, etc., in certain situations. The Circuit Judge specifically found against the appellants on this question.

As early as 1929, the Supreme Court of Florida, in Harz v. Paxton, 1929, 97 Fla. 154, 120 So. 3, in an opinion written by then Chief Justice Terrell, said:

> "We have examined the record, and it appears that the city of Sanford is fully authorized to zone the city and to regulate by ordinance the issuance of building permits such as are here involved. When the ordinance in question and the action of the city officials pursuant thereto are considered with reference to the rules applicable to the exercise of the police power in the regulation of the erection of filling stations and public garages, the operation of which involves acts which are generally recognized as potential menaces to the public safety and health because of the storage and handling therein of highly inflammable and explosive substances, it does not appear that in denying the permit here sought the respondent city officials have acted arbitrarily or unreasonably. See State ex rel. Lane v. Fleming, 129 Wash. 646, 225 P. 647, 34 A.L.R. 500; A. G. Construction Co. v. Scott, 136 A. 207, 5 N.J. Misc. R. 251; Cayce v. Hopkinsville, 217 Ky. 135, 289 S.W. 223; People of State of New York ex rel. Lieberman v. Van De Carr, 199 U.S. 552, 26 S. Ct. 144, 50 L. Ed. 305; State ex rel. Manhein v. Harrison, 164 La. 564, 114 So. 159. A different rule, however, might apply when buildings or businesses of innoxious character are involved. See State of

Washington ex rel. Seattle Title Trust Co. v. Roberge, 49 S. Ct. 50, 73 L. Ed.—; Dillon, Munic. Corp. (5th Ed.) §598."

In State v. Peace, 1939, 139 Fla. 394, 190 So. 607, the Supreme Court again had before it an ordinance in which the regulations of gasoline and oil filling stations was involved. The particular ordinance quoted in the opinion is as follows:

"'No gasoline and oil filling station and no service station shall be erected or located within 350 yards of any church, hospital, school or other such institution, where large numbers of pedestrians congregate, or within 750 feet of the location of another gasoline and oil filling station or service station.'"

Mr. Justice Terrell again wrote the opinion of the court, in which he said:

"The question of the City's power to enact the ordinance being disposed of in the affirmative, the question of whether or not that power was exercised in an arbitrary and unreasonable manner becomes very narrow, besides being a delicate one for the Courts to treat. Standards of business, social and professional conduct have their variations peculiar to every community. These standards such ordinances as that brought in question are designed to regulate and the manner of their regulation is distinctly a legislative function. If the ordinance is enacted in the interest of the public and is designed to correct an evil or evils that are or may affect the public welfare, it should be upheld. The manner in which these purposes are accomplished is one in which legislative discretion has a very broad range and courts should not attempt to substitute their judgment for that of the legislature, City Commission, or other legislative body created for that purpose.

"Measured by this standard, we cannot say that the ordinance is amenable to the assault made on it. Cer-

tainly it does not transgress the range of legislative discretion. . . ."

The court will take judicial notice of the tremendous increase in automobile traffic and the increasing problems confronting municipal authorities at the present time, as well as those prevalent at the time of the two opinions above set forth.

In a recent opinion by the Superior Court of New Jersey, Socony Mobil Oil Company v. Township of Ocean, N.J. Super. 1959, 153 A.2d 67, affirmed 157 A.2d 2, the court commented:

> "Municipalities have the power to regulate the location of gasoline stations within their boundaries, and even to prohibit them in certain zones where the facts warrant it. Schmidt v. Board of Adjustment of City of Newark, supra; L. P. Marron & Co. v. River Vale Tp., 54 N.J. Super. 64, 148 A.2d 205 (App. Div. 1959). Distinctions may not be made between uses where there is no reasonable basis or ground for any difference in treatment as that would constitute a violation of our constitutionally guaranteed equal protection and due process of law. Washington National Ins. Co. v. Board of Review, 1 N.J. 545, 64 A.2d 443 (1949); 8 McQuillin, Municipal Corporations (3d ed. rev. 1957), §25.123. However, a distinction will be presumed to be reasonable if there be any conceivable state of facts which support such action. The classification of gasoline service or filling stations for 'special regulation of such uses' has been sustained, as they are *sui generis* in that they are necessary to our present-day life, yet involve Schmidt v. Board of Adjustment of City of Newark, supra, 9 N.J. at page 422, 88 A.2d at page 615. Courts have taken judicial notice of the fact that the business of storing and handling gasoline at filling stations within a built-up area is attended with a peculiar degree of danger to life and property, due to its propensities and that the noxious odors, noise and traffic hazards emanating from the conduct

of such a business, makes the regulation of its location necessary and reasonable. Gore v. City of Carlinville, 9 Ill. 2d 296, 137 N.E.2d 368 (Sup. Ct. 1956); Hoffman v. Mayor and City Council of Baltimore, 187 Md. 593, 51 A.2d 269 (Ct. App. 1947); Albright v. Johnson, 135 N.J.L. 70, 50 A.2d 399 (Sup. Ct. 1946)."

See also City of San Antonio et al. v. Humble Oil & Refining Co., Texas 1930, 27 S.W.2d 868; Mayor and City Council of Baltimore v. Biermann, 1947, 187 Md. 514, 50 A.2d 804; and Adler v. City of Baltimore, 1959, 220 Md. 623, 155 A.2d 504.

We find nothing unreasonable in the ordinance hereinaboye discussed, and therefore, affirm the lower court.

Affirmed.

SMITH and WHITE, JJ., CONCUR.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A. D. 1962

MONDAY, NOVEMBER 5, 1962

FOOD FAIR STORES, INC., a foreign corporation, authorized to do business in Florida, and POMPANO FAIR REALTY CO., a Florida corporation,

Petitioners,

vs.

THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,

Respondent.

Case No. 31,987

This cause having heretofore been submitted to the Court on Petition for Writ of Certiorari upon the transcript of record and briefs to review the order of the District Court of Appeal of Florida, Second District, in said cause bearing date June 27, 1962, and the record having been inspected, it is ordered that said Petition be and the same is hereby denied.

A True Copy

TEST:

Guyte P. McCord
Clerk Supreme Court.

APPENDIX B

Text of Statutes and Provisions of Constitution Involved

ORDINANCE No. 664, CHARTER 50, ZONING CODE, CITY OF POMPANO BEACH, FLORIDA

Division 3. Building "3" Districts—Central Retail Businesses.

Sec. 50.189. Permitted uses.

Within any business "3" retail business district, as indicated on the zone plan, no building or premises shall be erected, used, arranged, or designed to be used in whole or in part for any industrial or manufacturing purposes, or for any other than one or more of the following specified uses:

(1) Principal Uses

(l) Filling stations for automotive vehicular service subject to the following provisions:

1. No filling station for automotive type service shall hereafter be constructed within seven hundred and fifty feet on a direct line measured along a street from the nearest corner of any lot, piece or parcel of land, abutting the same street, used for such purposes. Distance limitations do not apply to stations not along the same street having both entrance and exit along a different street. Pumps or pump islands shall not be located closer than fifteen feet from any street line.

2. A solid masonry perimeter wall three feet in height shall be provided along common lot lines. Such wall need not extend closer to a street right-of-way line than fifteen feet.

3. Nothing in this section shall prohibit the operation of existing gasoline and oil filling stations or service stations or the improvement, alteration or construction of any existing gasoline and oil filling stations or service stations.

4. Provided further that this section shall not apply to property or properties leased or owned in fee simple as evidenced by deed or lease of record prior to August 13, A. D., 1957, by any bonded gasoline distributor or his agent, dealer, leasee or consignee.

5. Provided that the applicable requirements as specified in section 50.26 of this chapter are met.

Sec. 50.26. Public garages, auto repair garage, bus terminals and filling stations.

No public garage, bus terminal, auto repair garage or filling station permitted in any district shall:

(1) Use processes in the pursuit of their services that shall be noxious or objectionable by reason of noise, odor, smoke, gas, dust, fumes, glare radiation (nuclear or other), vibration, fire or explosion hazard, that shall adversely involve the health, safety and general welfare of individuals and property, or the sanctity of the Sabbath, where said uses are located within two hundred feet of any established residential use, church, public park or public hospital.

(2) Use any part thereof for residence or sleeping purposes.

(3) If having capacity to accommodate more than five motor vehicles, have neither any part thereof, nor any driveway, entrance or exit to or from said uses within one hundred and fifty feet of the boundary line of any plot situated along the same street in

any district classification on which is located any structure used as a theatre, auditorium or other place of public assembly with seating capacity of over one hundred persons, or a church, hospital, or college, or within six hundred feet of a public school institution for dependents or children, or a public playground or athletic field, or similar recreational area. (Ord. 664, § 1.)

Constitution of the United States of America

Amendment XIV; Section 1: ". . . No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Office Supreme Court, U.S.
FILED
APR 25 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No. 973

FOOD FAIR STORES, INC., a Foreign Corporation Authorized to Do Business in Florida, and POMPANO FAIR REALTY CO., a Florida Corporation,
Appellants,

vs.

THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA.

APPELLEE'S MOTION TO DISMISS AND BRIEF IN SUPPORT THEREOF

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No.

FOOD FAIR STORES, INC., a Foreign Corporation Authorized to Do Business in Florida, and POMPANO FAIR REALTY CO., a Florida Corporation,
Appellants,

vs.

THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,
Appellee.

MOTION TO DISMISS APPEAL

COMES NOW the Appellee, ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA, by and through its undersigned attorneys, and moves this Honorable Court to Dismiss the Appeal of Appellants in this cause and states as grounds therefor:.

1. This appeal, having been taken from the Supreme Court of the State of Florida and not from the District

Court of Appeal, Second District, State of Florida, is not within the jurisdiction of the Supreme Court of the United States because not taken in conformity to 28 U.S.C.A., Sec. 1257 (2), and the Rules of the Supreme Court of the United States; or, in the alternative,

2. This appeal does not present a substantial federal question.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962.

No.

FOOD FAIR STORES, INC., a Foreign Corporation Authorized to Do Business in Florida, and POMPANO FAIR REALTY CO., a Florida Corporation,
Appellants,

vs.

THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA.

BRIEF IN SUPPORT OF MOTION TO DISMISS APPEAL

Constitution and Statutes Involved

With respect to Appellee's Motion to Dismiss Appeal, the following Constitutional and Statutory provisions are involved: (1) Article V, Constitution of the State of Florida; (2) 28 U.S.C.A., Sec. 1257(2). Both are set forth in Appendix A hereto.

Questions Presented by Appellee's Motion to Dismiss

(1) Whether this appeal, having been taken from the Supreme Court of the State of Florida, is within the jurisdiction of the Supreme Court of the United States as required by 28 U.S.C.A., Sec. 1257(2)?

(2) Are the questions presented in the jurisdictional statement of the Appellants substantial federal questions?

Statement of the Case

Appellants' Statement of the Case is quite accurate; however, Appellee would respectfully point out that consideration of this cause by the Supreme Court of the State of Florida was had pursuant to a Petition for Writ of Certiorari alleging that the opinion of the District Court of Appeals, Second District, State of Florida, was in direct conflict with certain enumerated decisions of the Supreme Court of Florida and with the rule of law set forth in said cases. Pursuant to Article V, Section 4, of the Constitution of the State of Florida, the issuance of the Writ in such cases is discretionary and the Supreme Court of Florida, in denying the Petition, passed only upon the jurisdictional question and not upon the merits of the cause. The importance of this matter will be treated *infra* herein.

Argument

(1) Whether this appeal, having been taken from the Supreme Court of the State of Florida, is within the jurisdiction of the Supreme Court of the United States as required by 28 U.S.C.A., Sec. 1257(2)?

In the State of Florida, the circuit courts and certain other inferior courts have jurisdiction over all trial matters, with the circuit courts also having certain limited powers of review as an appellate court. Constitution of the State of Florida, Article V, Sections 1, 6, 7, 8, 9, 10 and 11. Except in certain enumerated cases, appeals or petitions for certiorari from such courts are taken to one of three District Courts of Appeal, depending upon the district in which the circuit court is located. Constitution of the State of

Florida, Article V, Sections 4, 5 and 26. In Article V, Section 4, Constitution of the State of Florida, it is provided as follows, in pertinent part:

"SECTION 4. Supreme Court.

(1) . . . . .

(2) JURISDICTION.

. . . . . The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law."

As pointed out on pages 6 and 7 of Appellants' Jurisdictional Statement, Appellants filed in the Supreme Court of Florida a Petition for a Writ of Certiorari from the decision of the District Court of Appeal, Second District, State of Florida (hereinafter called District Court), reciting in said Petition that the District Court of Appeal was presented with, *inter alia*, the following point of law:

"Whether the Court below erred in determining that an ordinance of the City of Pompano Beach prohibiting Appellant (sic) from erecting a gasoline filling station within seven hundred fifty feet of another station along the same street, while allowing others to do so and while permitting gasoline filling stations only one hundred fifty feet along the same street from public assemblies, theatres, auditoriums and other places where people congregated, gave equal protection of the law as provided by Sections 1 and 12 of the Declaration of Rights of the Florida Constitution and the Fourteenth Amendment to the Constitution of the United States of America."

and that on these points of law the District Court found nothing unreasonable in the ordinance. It is then pointed out that the Supreme Court of Florida, without opinion on the merits, on November 5, 1962, ordered that Appellants' Petition for Certiorari be denied. It was not pointed out, however, that the Appellants' Petition for Certiorari to the Supreme Court of the State of Florida was predicated, as the Constitution of Florida requires, upon the allegation that the decision of the District Court was in direct conflict with several enumerated opinions of the Supreme Court of Florida on the same point of law. The Supreme Court of Florida decided that the Appellants had failed to clear the first hurdle, that of jurisdiction based upon an alleged direct conflict on the same point of law, and consequently the Petition for Certiorari was denied for lack of jurisdiction. The merits of the constitutional questions which Appellants set forth as having been raised before the District Court, and the question of whether that District Court erred in its decision thereon, were never considered or decided by the Supreme Court of Florida. Appellee filed its brief in the Supreme Court of Florida directed only to the jurisdictional question and was never requested nor required to file a brief on the merits.

The case of *Michigan-Wisconsin Pipeline Co.* v. *Calvert*, 347 U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583, involved a suit instituted against Texas state officials in a state district court seeking a determination that a state tax statute, as applied to the appellants, was violative of the commerce clause of the United States Constitution. The district court entered judgment for the appellants but the Texas Court of Civil Appeals reversed, holding that the tax statute as applied to the appellants was constitutional. The Supreme Court of the State of Texas refused appellants' applications for writs of error. It was pointed out in the opinion of the Supreme Court of the United States that the

effect of the refusal to grant the writs of error constituted a determination by the Texas Supreme Court, under Texas statute and rules of procedure, that the judgment of the Court of Civil Appeals was a correct one and the principles of law declared in the opinion correctly determined. The appellants were uncertain whether their appeal to the Supreme Court of the United States was properly from the Court of Civil Appeals or the Supreme Court of Texas under 28 U.S.C.A., Sec. 1257(2), which statute requires that appeals be taken from the highest court of a state in which a decision could be had. A a result of this uncertainty, appellants appealed from each of the courts.

The Supreme Court of the United States, after postponing a determination of the jurisdictional question to the hearing of the cases on the merits, had the following to say, per Justice Clark, at 74 S. Ct. 397:

> "We think that appeals in these cases were properly from the Court of Civil Appeals. In American Ry. Exp. Co. v. Levee, 1923, 263 U.S. 19, 44 S. Ct. 11, 12, 68 L. Ed. 140, the Supreme Court of Louisiana had refused a writ of certiorari to the State Court of Appeal 'for the reason that the judgment is correct.' Mr. Justice Holmes, speaking for a unanimous Court, said:
>
> "'* * * [U]nder the Constitution of the State the jurisdiction of the Supreme Court is discretionary * * * and although it was necessary for the petitioner to invoke that jurisdiction in order to make it certain that the case could go no farther, * * * when the jurisdiction was declined the Court of Appeal was shown to be the highest Court of the State in which a decision could be had. Another section of the article cited required the Supreme Court to give its reasons for refusing the writ, and therefore the fact that the reason happened to be an opinion upon the merits rather than some more technical consideration, did not take from the refusal its ostensible character of declining juris-

diction. 'Western Union Telegraph Co. v. Crovo, 220 U.S. 364, 366, 31 S. Ct. 399 [400]; 55 L. Ed. 1082. Of course the limit of time for applying to this Court was from the date when the writ of certiorari was refused.' 263 U.S. at pages 20-21, 44 S. Ct. at page 12.

In Lone Star Gas Co. v. State of Texas, 1938, 304 U.S. 224, 551, 58 S. Ct. 883, 82 L. Ed. 1304, with the present Texas procedural provisions in effect this Court's mandate issued to the Court of Civil Appeals in a case where the State Supreme Court had 'refused' writ of error. See also United Gas Public Service Co. v. State of Texas, 1937, 301 U.S. 667, 57 S. Ct. 921, 81 L. Ed. 1332.

Accordingly the appeals in Nos. 199 and 201, from the Supreme Court of Texas, are dismissed. We proceed to consider Nos. 198 and 200."

It is clear from a reading of the applicable provisions of the Constitution of the State of Florida that the jurisdiction of the Supreme Court upon a Petition for Certiorari alleging a direct conflict with a decision of another District Court or of the Supreme Court of Florida on the same point of law is discretionary. It is also clear by decision of the Supreme Court of the United States that in such cases, where the Supreme Court of a state, or other court of final appellate jurisdiction by whatever name called, declines jurisdiction that the next previous appellate court, which in this case is the District Court, becomes the highest court of the state in which a decision could be had for purposes of determining the jurisdiction of the Supreme Court of the United States pursuant to 28 U.S.C.A., Sec. 1257(2). Appellants have taken their appeal from the Supreme Court of Florida, as the Jurisdictional Statement and supporting documents demonstrate, rather than from the District Court, and consequently their appeal is not within the jurisdiction of the Supreme Court of the United States because

it has not been prosecuted in conformity to statute and to the Rules of the Supreme Court of the United States.

(2) Are the questions presented in the jurisdictional statement of the Appellants substantial federal questions?

It is too elementary a proposition for extensive citation of authority that a substantial federal question necessary to the determination of the cause must have been presented to and passed upon by the highest state court having jurisdiction before the Supreme Court of the United States will take jurisdiction to review it. *Durley* v. *Mayo*, 351 U.S. 277, 76 S. Ct. 806, 100 L. Ed. 1178, reh. den. 352 U.S. 859, 77 S. Ct. 22, 1 L. Ed. 2d 69; *Palmer Oil Corporation* v. *Amerada Petroleum Corporation*, 343 U.S. 390, 72 S. Ct. 842, 96 L. Ed. 1022.

Before discussing the three reasons which Appellants set forth in their jurisdictional statement to establish a substantial federal question, Appellee would first point out that certain criteria have been established by previous decisions for testing the validity or invalidity of zoning ordinances. It has been held that the legislative determinations of a city council as to zoning regulations should not be interfered with by the courts unless they are clearly arbitrary and unreasonable. *Goreib* v. *Fox*, 247 U.S. 603, 47 S. Ct. 675, 71 L. Ed. 1228; *Zahn* v. *Board of Public Works of City of Los Angeles*, 274 U.S. 325, 47 S. Ct. 594, 71 L. Ed. 1074. And in the landmark case of *Village of Euclid, Ohio*, v. *Ambler Realty Co.*, 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, it was concluded that if the validity of zoning classifications be fairly debatable, the courts should allow the determination of the legislature to prevail. See also *Standard Oil Co.* v. *City of Marysville*, 279 U.S. 582, 49 S. Ct. 430, 73 L. Ed. 856, interpretation of opinion denied 282 U.S. 797, 51 S. Ct. 38, 75 L. Ed. 718. And in *Nectow* v. *City of Cambridge*, 277 U.S. 183, 48 S. Ct. 447, 72 L. Ed. 842,

it was stated that a court should not set aside the determination of public officers in zoning matters unless the action complained of has no basis in reason and consists merely of an arbitrary and irrational exercise of power having no substantial relation to the public health, safety, welfare and morals.

Appellants assert that the questions in this cause are substantial for three reasons, the first of which alleges that the ordinance in question contains an unreasonable classification resulting in arbitrary discrimination against them and in favor of others *similarly situated.* The discrimination allegedly exists in the exception found in the ordinance which eliminates from its requirements, property or properties leased or owned in fee simple as evidenced by deed or lease of record prior to August 13, A.D. 1957, by a bonded gasoline distributor or his agent, dealer, lessee or consignee.

In the case of *Village of Euclid, Ohio,* v. *Ambler Realty Co.,* 272 U.S. 365, 47 S. Ct. 114, 71 L. Ed. 303, this Court upheld and approved the power of a municipality to create zoning districts and to define the classifications or uses which would be allowable in each such district. The applicability of the requirements and restrictions contained in such zoning ordinances must, of necessity, be prospective rather than retrospective, as to deprive an individual of a substantial existing use by the passage of an ordinance without providing for compensation would be a gross deprivation of property without due process of law. Thus it is that substantial, existing uses, which are perhaps more appropriately termed non-conforming uses, in being at the time of the adoption of a zoning ordinance are exempted from its requirements, in many cases specifically in the adopting legislation and in others at least by existing notions of constitutional guarantees; and, this is true to the

extent that the allowance of the continuance of such pre-existing uses has been held not to constitute discrimination tending to create a monopoly nor to be a denial of equal protection under the Fourteenth Amendment to the United States Constitution to those persons within the zone not having such uses but desiring them subsequent to the adoption of the zoning ordinance. *Sampere* v. *City of New Orleans*, 166 La. 776, 117 So. 827, aff'd without opinion, 279 U.S. 812, 49 S. Ct. 262, 73 L. Ed. 971. The appellants in this case are no more similarly situated to the class exempted in the ordinance than are persons not possessing non-conforming uses similarly situated to those possessing such uses at the time of the adoption of a zoning ordinance. The legislative authority of the City of Pompano Beach, Florida, in its legislative understanding of local problems, recognized at the time of the adoption of the zoning ordinance in 1957 that there had already accrued to a class of persons substantial rights based upon substantial plans and substantial monetary investments directed toward the construction of gasoline filling stations and, for the purpose of protecting those rights as property within the ambit of constitutional shelter, the exempted class was established. Contrary to the contention of Appellants, the ordinance was designed to protect the property rights of a legitimate class of persons and not to deprive Appellants of their property or of the equal protection of the laws, nor does it so deprive Appellants in its operation. Appellants' claim that they are similarly situated to the exempted class is a bare assertion of a conclusion of law without basis in fact or reason.

It should also be noted that under this first point the Appellants attempt to assert the ground that there is no basis for differentiation between bonded gasoline distributors who owned or leased property within the area prior to August 13, 1957, and bonded gasoline distributors who

became owners or lessees after that date and were not agents, dealers, lessees or consignees of the former. Clearly Appellants, admittedly not being bonded gasoline distributors, or agents, dealers, lessees or consignees thereof, are not members of the class entitled to complain about an alleged discriminatory classification. *First National Bank* v. *Louisiana Tax Commission*, 289 U.S. 60, 53 S. Ct. 511, 70 L. Ed. 1030.

The second point raised by Appellants, while ostensibly concerned with the question of whether the distance limitation between gasoline stations as contained in the ordinance is reasonably related to the evil sought to be corrected, is inextricably interwoven with the previous argument based upon alleged discriminatory classification. Suffice it to say that the thrust of the argument is aimed solely at the inherent hazards of gasoline filing stations consisting of fire, explosion, noxious odors, fumes, "and so forth". No attention is given to other equally important considerations of the public health, welfare and safety as was so concisely pointed out by the District Court in its opinion in *Food Fair Stores, Inc.*, v. *Zoning Board of Appeals of the City of Pompano Beach, Florida*, 143 So.2d 58, 60 (Fla. App. 1962), wherein it stated:

> "Extensive testimony was taken in this case which included testimony of a professional traffic engineer, whose summarized testimony was to the effect that it is desirable to separate pedestrian and vehicular traffic; that marginal access points upon streets create greater traffic problems; that there is a traffic problem at the intersection where the gasoline station proposed by appellants was to be located and that the investment of the public in relation to U. S. Highway No. 1, an arterial highway, would thereby be destroyed; and that the indiscriminate construction of drive-in type businesses along arterial streets and on corners has a detrimental effect on vehicular and pedestrian traf-

> fic. Also testifying was the Director of Planning for Broward County, who stated that the planners gave special consideration to gasoline stations because of problems peculiar to such businesses, including fire hazards, traffic hazards, pedestrian hazards and related problems; the necessity for complete prohibition of gasoline stations in certain areas; and the concern for certain esthetic considerations. There was also testimony concerning the location of public schools in close proximity to the intersection in question. The appellants strenuously argued that this zoning along distinct lines was done to create a monopoly, etc., in certain situations. The Circuit Judge specifically found against the appellants on this question."

Fire hazard is not the only consideration to which the public health, safety and welfare is entitled in the enactment of zoning ordinances.

As to the question of a discriminatory classification as argued under point number two of Appellants' three points, the arguments already made under point number one should suffice without repetition.

Regarding point number three, Appellee would be less than candid if it did not agree that federal constitutional guarantees should be zealously guarded by federal courts and that inaction or evasion of duty by state courts as to federal constitutional questions should not be allowed to defeat the jurisdiction of the Supreme Court of the United States as to those questions. Appellee asserts, however, that both the circuit court judge and the District Court fully considered the constitutional arguments advanced by Appellants here and found them not to be substantial. With those findings Appellee heartily concurs. As pointed out above, the Supreme Court of Florida did not skirt, fail or refuse to consider the federal constitutional questions involved in the cause, but simply refused jurisdiction

pursuant to the dictates of the Constitution of the State of Florida.

For the foregoing reasons, Appellee respectfully prays and urges that the jurisdiction of this Court has not been properly invoked in accord with the statutes and rules appertaining thereto and there is no substantial federal question divulged by the jurisdictional statement in support of this appeal and that consequently, its Motion to Dismiss should be granted.

Respectfully submitted,

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APPENDIX A

28 U.S.C.A., Sec. 1257. State Courts; appeal; certiorari.

Final judgments or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) . . . . .

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

Florida Constitution, Article V, Section 4(2).

SECTION 4. Supreme Court.—

(1) . . . . .

(2) JURISDICTION. . . . . .

Appeals from district courts of appeal may be taken to the supreme court, as a matter of right, only from decisions initially passing upon the validity of a state statute or a federal statute or treaty, or initially construing a controlling provision of the Florida or federal constitution. The supreme court may review by certiorari any decision of a district court of appeal that affects a class of constitutional or state officers, or that passes upon a question certified by the district court of appeal to be of great public interest, or that is in direct conflict with a decision of another district court of appeal or of the supreme court on the same point of law, and may issue writs of certiorari to commissions established by law.

PROOF OF SERVICE

I, ROBERT B. COCHRAN of the City of Pompano Beach, Florida, attorney of record for THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA, appellee herein, depose and say that on the 24th day of April, 1963, I served a copy of the attached Appellee's Motion To Dismiss And Brief In Support Thereof, as required by Rule 16 of the Rules Supreme Court United States, on Food Fair Stores, Inc., a Foreign Corporation authorized to do business in Florida, and Pompano Fair Realty Co., a Florida Corporation, appellants herein, by mailing said copy in a duly addressed envelope with first class postage prepaid to the appellants' attorney of record, Harry Shapiro, Esq., care of Alfred Aronovitz, Esq., Aronovitz, Aronovitz and Haverfield, at 748 Seybold Building, Miami, Florida.

ROBERT B. COCHRAN

ROBERT B. COCHRAN

SUBSCRIBED AND SWORN TO before me at Pompano Beach, Broward County, Florida, this 24th day of April, 1963.

Pamela Kriegel

NOTARY PUBLIC

My commission expires:

NOTARY PUBLIC, STATE of FLORIDA at LARGE
MY COMMISSION EXPIRES JAN. 25, 1966

Office Supreme Court, U.S.
FILED
MAY 14 1963
JOHN F. DAVIS, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1962

No. 973

FOOD FAIR STORES, INC., a Foreign Corporation Authorized to Do Business in Florida, and POMPANO FAIR REALTY CO., a Florida Corporation,
Appellants,

vs.

THE ZONING BOARD OF APPEALS OF THE CITY OF POMPANO BEACH, FLORIDA,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPELLANTS' REPLY BRIEF IN OPPOSITION TO MOTION TO DISMISS

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Appellee.

ON APPEAL FROM THE SUPREME COURT OF FLORIDA

APPELLANTS' REPLY BRIEF IN OPPOSITION TO MOTION TO DISMISS

QUESTIONS PRESENTED BY APPELLEE'S MOTION TO DISMISS

(1) Whether this appeal, having been taken from the Supreme Court of Florida, is within the jurisdiction of the Supreme Court of the United States as required by 28 U.S.C.A., § 1257 (2)?

(2) Are the questions presented in the jurisdictional statement of the Appellants substantial federal questions?

STATEMENT OF THE CASE

Appellee's addition to the statement of the case is accepted with the exception of the conclusion drawn therein that the denial of Appellants' petition for Writ of Certiorari by the Supreme Court of Florida passed only upon the jurisdictional question and not upon the merits of the cause. This matter is treated in argument below.

ARGUMENT

(1) Whether this appeal, having been taken from the Supreme Court of Florida, is within the jurisdiction of the Supreme Court of the United States as required by 28 U.S.C.A., § 1257(2)?

It is quite correct that Appellant invoked the jurisdiction of the Supreme Court of Florida upon the contention that the opinion of the District Court of Appeal was in direct conflict with several enumerated opinions of the Supreme Court of Florida. However, it is Appellants' contention that the conflict between those cases and the case at bar, as set out below, was so patent that of necessity the Supreme Court of Florida considered the conflict and affirmed the District Court of Appeal by its act of denying the Writ of Certiorari sought by Appellants.

Appellee's contention that the Supreme Court of Florida never passed on the merits of the constitutional questions presented is founded on the fact that Appellee never filed nor was it requested or required to file a brief on

the merits. However, the failure to file a brief on the merits and the choice to restrict the brief to the question of jurisdiction was a calculated risk by the Appellee. The Florida Appellate Rules make no provision that a Respondent may file a brief as to jurisdiction only and then have the privilege of filing a brief on the merits when jurisdiction is accepted; nor is it true that the Supreme Court of Florida may request or require an additional brief on the merits.[1] The mere fact that Appellee (Respondent) prevailed in the Supreme Court of Florida without a brief on the merits is no more an indication that the court failed to reach the merits than if Appellee had ventured the risk not to file a brief at all. If we were to assume that Appellee's logic is correct, then in any case where there is but one point on appeal if the Appellee refused to file a brief on the point, the Court could not decide the issue.

In regard to the principle that a city may not by ordinance or action thereunder deny the use of property to one group while allowing others similarly situated to enjoy the use, Appellant presented the following cases to the Supreme Court of Florida as being in principle directly in conflict with the case at bar: *Kass* v. *Lewin*, 104 So.2d 572 (1958); *Liquor Store* v. *Continental Distilling Corp.*, 40 So.2d 371 (1949); *Caldwell* v. *Mann*, 157 Fla. 633, 26 So.2d 788 (1946); *City of Eau Gallie* v. *Holland*, 98 So.2d 786 (1957).

In *Kass* v. *Lewin*, 104 So.2d 572 (1958), the Court struck down a state statute which required the platting of certain lands while not requiring the same of other lands

1. Fla. App. Rules 4.5 c. Certiorari: (3) Respondent's brief and Cross Petition: ". . . The Respondent shall file his brief in opposition to the writ . . . and serve a copy thereof on the petitioner within 20 days after he has been served with a copy of petitioner's brief." (See Appendix.)

and wherein no public purpose was served and unequal burdens were cast upon similarly situated property owners. The Supreme Court of Florida found the statute to be violative of the equal protection clauses of both state and federal constitutions.

In *Liquor Store* v. *Continental Distilling Corp.*, 40 So.2d 371 (1949), the Supreme Court of Florida struck down injunctive relief granted under a price-fixing contract entered into under the Florida Fair Trade Law, a police power measure. In protecting "name brand products" the Court found that the law in its operation and effect was arbitrary and unreasonable, violating the right to own and enjoy property. The Court stated that a police-power measure "[t]o be valid . . . must apply to the general public as distinguished from a particular group or class. The idea of general welfare should banish the thought that the state may subordinate the right of one group of citizens to advance the welfare of another. . . . These principles are fundamental."

In *Caldwell* v. *Mann*, 157 Fla. 633, 25 So.2d 788 (1946), under circumstances where certain state statutes prohibited possession, sale or offering for sale of mullet during a specified period of time in certain inland counties, while allowing such acts in other inland counties during the same period of time, the Florida Supreme Court found no reasonable classification and held that imposing burdens on some citizens of the state that in kind or extent are not imposed on other citizens of the state under practically similar conditions, with no conceivable just basis for the classifications or discriminations, constitutes a denial to those injuriously affected of the equal protection of the laws in violation of the Fourteenth Amendment to the Federal Constitution.

The conflict of decisions was most evident in *City of Eau Gallie* v. *Holland*, 98 So.2d 786 (1957). In that case the Supreme Court of Florida invalidated the action of a city which denied a trailer park license to the plaintiff while at the same time granting licenses to others similarly situated, terming such action arbitrary and discriminatory.

The conclusion is inescapable that the cases cited directly conflict with the case at bar. The Supreme Court of Florida could not help but consider the conflict and decide it, albeit that it chose to affirm the District Court by denial of the writ sought.

Appellant next addresses the question of the meaning of 28 U.S.C.A., § 1257, which states:

> "Final judgments or decrees rendered by the highest court of a State in which a decision *could be had*, may be reviewed by the Supreme Court as follows:
>
> (2) By appeal where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

Appellee contends and cites cases allegedly in support of the proposition that the highest court of the State of Florida in which a decision of this matter "*could be had*" is the District Court of Appeal and not the Supreme Court of Florida. Appellant submits that the cases cited are distinguishable, but that if applicable they are a perversion of the plain meaning of the words "*could be had*" in 28 U.S.C.A., § 1257, and urges this court to correctly take jurisdiction of this case in accordance with that plain meaning.

Referring to the cases cited by Appellee we consider first *Michigan-Wisconsin Pipe Line Co.* v. *Calvert*, 347

U.S. 157, 74 S. Ct. 396, 98 L. Ed. 583. Therein, the court looked to *Texas law* and determined *thereunder* that refusal of the writ of error sought by appellant by the State Supreme Court was a denial of jurisdiction making the next court below the highest court in which a decision could be had. In the case at bar it is not true that denial of a petition for a Writ of Certiorari in Florida is a denial of jurisdiction. The reasons for appellant's contention are set forth above; and appellee has cited no Florida cases to indicate that the denial of certiorari by the Florida Supreme Court must perforce be on jurisdictional grounds only.

In *American Ry. Exp. Co.* v. *Levee*, 263 U.S. 19, 44 S. Ct. 11, 68 L. Ed. 140, cited in *Michigan-Wisconsin Pipe Line Co.* v. *Calvert, under Louisiana law* it was necessary to conclude that refusal of Certiorari by the Supreme Court of Louisiana was a jurisdictional decision, but this does not lead to the conclusion that Florida law operates in the same fashion.

In *Western Union Telegraph Co.* v. *Crovo*, 220 U.S. 364, 31 S. Ct. 399, 55 L.Ed. 1082, because of indecision, appellant appealed from both state courts below, appellate and trial. This court granted the writ to the trial court, but did not decide that if Appellant had taken the writ from the appellate court only, that it would have declined jurisdiction altogether.

In *Lone Star Gas Co.* v. *State of Texas*, 304 U.S. 224, 58 S. Ct. 883, 82 L.Ed. 1304, it is true that this court's mandate was directed to the Court of Civil Appeals after the Supreme Court of Texas refused a writ of error. However, this court could have directed the Supreme Court of Texas to grant the writ and proceed in accordance with this court's opinion if appellant had appealed from the

denial of the writ of error by the Supreme Court of Texas. Since appellant had not appealed the decision of the latter court, it was not necessary to direct that court to comply with the mandate of this Court. Moreover, as Appellee points out "the present Texas procedural provisions [were] in effect", and Texas law may require the view that the Court of Civil Appeals was the proper court from which to appeal. This rule, however, as stated above, is not binding on Florida.

Appellant further contends that the position taken in the above cases, with the exception of *Western Union Telegraph Co.* v. *Crovo*, is derived from the opinion of this Court in *Norfolk & Suburban Turnpike Co.* v. *Comm. of Virginia*, 255 U.S. 264, 32 S. Ct. 828, 56 L.Ed. 1082. In dictum in that case, this Court chose to set out its policy by a rule to operate in futuro; that is, the Court announced that it would thereafter simplify jurisdictional problems of deciding from which state court an appeal should be taken by limiting itself to the face of the record. In that very case, however, the court acted in opposition to its rule and granted a writ of error to the Supreme Court of Appeals of the State of Virginia which in turn had *refused* a writ of error to the court below. It is clear that the court was not ruling on a jurisdictional issue but merely setting out a rule of court. Had the question been one of jurisdiction the court would have been obliged to decline jurisdiction. This was not done.

Appellants submit that although this court has endeavored to follow the *Norfolk* rule, it has, for convenience of the Court, chosen to deny the right of appeal set out explicitly in 28 U.S.C.A., § 1257. Appellants suggest that justice is denied when this court forces an appellant at his peril to select the court below from which to appeal on the basis of a rule of convenience detached from the

applicable law of the state from whose courts the appeal is taken.

In the alternative, Appellants further contend that the plain meaning of the words "could be had" in 28 U.S.C.A., § 1257, have been interpreted to mean "was had" and that such interpretation is another "rule of court" used to limit jurisdiction in spite of the express meaning of the statute. While it is true that Congress may limit or eliminate the appellate jurisdiction of this Court, Appellants submit that the Court should not further narrow its appellate jurisdiction so as to deprive litigants of a statutory right.

By definition[2] the word "could" when used with an infinitive as an auxiliary of predication (as it is used in 28 U.S.C.A., § 1257) means "to be able", "to have the power, ability or capacity." Within the obvious meaning of these words, if it is true that a state appellate Court may, within its discretion, accept or decline jurisdiction, then the very existence of the power to accept jurisdiction means that a decision "could be had" in that court.

Knowing that the Supreme Court of Florida had the power to exercise jurisdiction, as admitted by the Appellee, it follows that a decision "could be Had" in that court. Whether or not a decision "was had" is immaterial under a plain meaning interpretation of § 1257.

(2) Are the questions presented in the jurisdictional statement of the Appellants substantial federal questions?

In response to Appellee's argument in regard to the substantiality of the federal questions involved, Appellants

2. Oxford English Dictionary, Vol. II, Oxford Press, 1933.

reassert the argument set out in the Jurisdictional Statement, adding only that the cases cited by the Appellee fail to reach the essential issues advanced by Appellant.

For the foregoing reasons Appellants respectfully submit that Appellee's Motion to dismiss should be denied and urge the Court to take jurisdiction of this case.

Respectfully submitted,

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APPENDIX A

Florida Appellate Rules

Rule 4.5. Extraordinary Writs: Mandamus, Certiorari, Prohibition, Quo Warranto, Habeas Corpus, and Stay Writs.

c. Certiorari.

(1) **Petition to Be Supported by Transcript and Brief.** Application for writ of certiorari shall be by petition filed in the Court within 60 days from the rendition of the decision, order, judgment or decree sought to be reviewed. Unless otherwise ordered by the Court, it shall be accompanied by a certified transcript of the record of the proceedings the petitioner seeks to have reviewed or so much thereof as is essential. Unless shown by the respondent or his attorney to be necessary, no other record shall be required. The petition shall contain a concise statement of the cause and the reasons relied on for granting the writ. It shall be accompanied by a supporting brief prepared as provided by Rule 3.7.

(2) **Respondent to Be Served with Petition, Transcript and Brief.** Unless otherwise ordered by the Court, a copy of the petition, transcript, and brief shall be served on respondent or his attorney on or before the time the application is filed with the clerk of the Court.

(3) **Respondent's Brief and Cross-petition.** If the respondent desires to have reviewed any adverse ruling in the decision, order, judgment or decree under review, he shall, within 20 days from the service on him of the documents provided in paragraph (2) of this rule, serve on petitioner a copy of his cross-petition for certiorari which shall be prepared in accordance with the requirements of

the original petition, and such additional portions of the record as may be essential to such review.

The respondent shall file his brief in opposition to the writ and, where a cross-petition is filed, in support of his cross-petition and serve a copy thereof on the petitioner within 20 days after he has been served with a copy of petitioner's brief.

(4) **Reply Briefs.** Petitioner shall file such reply brief as he deems necessary, and serve a copy of the same on respondent, within 10 days after he has been served with a copy of respondent's brief.

Respondent shall have five days thereafter to file a reply brief in support of his cross-petition.

(5) **Oral Argument.** Except hearings for review of workmen's compensation orders the petition shall be set down for oral argument as directed by the Court on some motion day after the time allowed petitioner herein to file his reply brief; and, unless further proceedings are ordered by the Court, the cause shall be finally disposed of without further oral argument.

Review of workmen's compensation orders pursuant to statute and Rule 4.1, shall be set for hearing on regular oral argument days in accord with the provisions of Rule 3.10(a)-(e).

(6) **From District Court to Supreme Court.** Where any decision of a district court of appeal (1) affects a class of constitutional or state officers, or (2) passes upon a question certified by such district court to be of great public interest, or (3) is in direct conflict with a decision of another district court of appeal or of the Supreme Court on the same point of law, petition may be filed with the Supreme Court to issue a writ of certiorari to review such decision.

The petition for certiorari under this rule shall be filed in the Supreme Court within 60 days from the rendition of the order, decision or judgment of the district court of appeal. The petition shall set forth briefly and clearly the grounds for invoking jurisdiction of the Supreme Court and the facts relied upon for the issuance of the writ. Unless the district court shall otherwise direct for good cause shown after notice and hearing, a petition for certiorari filed in the Supreme Court within 15 days from the date of the filing of the order, decision or judgment sought to be reviewed or within 15 days from the date of the disposition of a petition for rehearing shall automatically stay further proceedings in the district court and the trial court until the disposition of said petition by the Supreme Court; otherwise such petition for certiorari shall operate as a stay of such proceedings only upon the order of the Supreme Court after due notice to the adverse party.

Only so much of the record as shall be necessary to show jurisdiction in the Supreme Court and establish facts relied upon by the petitioners shall be attached to or filed with the petition. See rule 7.2i (Forms) for suggestions as to proper portions of record to be transmitted with petition for certiorari.

Copy of petition with certificate of filing the same in the Supreme Court shall be filed in the district court of appeal.

Copy of petition, supporting portions of the record and brief shall be served on respondent or his attorney on or before the time petition is filed with the Clerk of the Supreme Court. The respondent shall file his brief in opposition to the writ and serve a copy thereof upon the petitioner within 20 days after he has been served with a

copy of the petition, supporting portions of the record and brief of petitioner.

The Supreme Court shall consider the petition, supporting record or portions thereof and briefs and if the Court shall not have jurisdiction or if the petition is without merit, shall deny the same. If the Court determines to entertain further proceedings, the Court will set the same for oral argument on a day certain and at said time may order the filing of such further record or briefs as it may deem desirable for proper disposition of the cause, or that, upon motion of either party, it may determine is essential therefor. Petitioner shall file such reply brief as he deems necessary and serve a copy of the same on respondent within 10 days after he has been served with a copy of respondent's brief.

PROOF OF SERVICE

I, HARRY SHAPIRO, 306 South Nineteenth Street, Philadelphia 3, Penna., one of the attorneys for FOOD FAIR STORES, INC., and POMPANO FAIR REALTY CO., appellants herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that on the day of May, 1963, I served a copy of the foregoing Appellant's Reply Brief in Response to Appellee's Motion to Dismiss on the Zoning Board of Appeals of the City of Pompano Beach, Florida, Appellee herein, by mailing said copy in a duly addressed envelope with first class postage prepaid to the Appellee's, Attorney of record, ROBERT B. COCHRAN, ESQ., care of Bruno Di Giulian, City Attorney, 101 S. W. 1st Avenue, Pompano Beach, Florida.

HARRY SHAPIRO